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Interference with the Public Right of Navigation and the Riparian Owner's Claim of Privilege

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Entering a navigable body of water from the upland, and navigating from the point of access to distant points on the same body of water or points on connecting bodies of water, are, for practical purposes, a continuation of the same act. Yet they involve significantly different legal concepts and raise significantly different issues. The problems resulting from interference with a riparian owner's right of access to and from his upland are examined in Part I of this article; those involving his right to travel once he has obtained access are the subject of Part II.

I. ACCESS

A. *Generally*

The act of entering and leaving a navigable water body typically involves use of the adjacent upland. A stranger who attempts to gain access to the water body by crossing privately-owned upland ordinarily commits a trespass; the right of access across his upland belongs only to the upland owner. If this right is interfered with or materially hindered by others, the courts do not hesitate to protect the upland owner's right.[1]

Like all "rights," the right of access is not absolute. An occasional close case may go against the riparian because the court is not convinced he has really been hurt,[2] or because the court feels that some interference was an unavoidable result of the exercise of this right by others, or of equally important public rights. Cases of the latter type require the courts to

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1. Ferry Pass Inspectors' & Shippers' Ass'n. v. Whites River Inspectors' & Shippers' Ass'n., 57 Fla. 399, 48 So. 643 (1909); Turner v. Holland, 54 Mich. 300, 20 N.W. 51 (1884), *aff'd*, 65 Mich. 453, 33 N.W. 283 (1887); Delaplaine v. Chicago & N.W. R.R., 42 Wis. 214 (1877); Northern Pac. Ry. v. Slade Lumber Co., 61 Wash. 195, 112 P. 240 (1910). *See* Annot., 21 ALR 206-11 (1922); 56 Am. Jur. *Waters*, §§ 216-17 (1947). *See also* 1 H. FARNHAM, THE LAW OF WATERS AND WATER RIGHTS 297 (904).

2. *E.g.*, Duval Eng'r. and Contracting Co. v. Sales, 77 So.2d 431 (Fla. 1954) (Bridge constructed across river in front of plaintiffs' upland. Decree for plaintiffs, holding unlawful interference with riparian rights including right of access, reversed: "It is not shown that these have been materially disturbed." *Id.* at 434).

weigh the policies in support of the riparian's exclusive right against the policies which are in conflict with it, and to strike a balance between them. For example, in *Sherlock v. Bainbridge*,[3] neighboring riparians had each constructed wharves out to the channel for the purpose of servicing steamers using the river. Occasionally the river current swung a steamer, tied to one of the wharves, in such a way that it blocked other vessels from reaching the neighboring wharf. On complaint by neighboring dock owner against the owner of a vessel which blocked his wharf in this fashion, the court held that in the absence of a showing of negligence in the manner in which the vessel was moored, there was no liability for interference with access. The public right of navigation included the right to stop where required by the purposes of the navigation for a reasonable time to take on and discharge passengers and cargo. The vessels were free to choose between wharves competing for their business. If in doing this some blockage occurred, it was incident to the primary right of navigation, and not actionable.[4]

Another example of conflicting policies, in which the upland owner's claim to exclusive use is subordinated to a more basic claim, is the situation of the vessel whose personnel or cargo are placed in sudden peril, necessitating that it be beached or some other use of the upland be made. Under these circumstances, it cannot be expected that the navigator will obtain permission prior to landing. He will not be liable for failure to obtain permission if he acts reasonably under the circumstances and no substantial injury to the upland owner's interests result.[5]

B. *Government Improvements "in aid of navigation"*

When the riparian owner's access is materially impaired or is totally cut off as a result of government improvements to the water body, the balance becomes harder to strike. This situation differs from those discussed above in several significant ways. First, the upland owner's access is typically hindered or destroyed permanently, rather than temporarily

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3. 41 Ind. 35 (1872).

4. *See also* Cohn v. The Wausau Boom Co., 47 Wis. 314, 2 N.W. 546 (1879) (log boom and pilings interferred with upland owner's access to river; no recovery, on theory that the Boom Company, a quasi-public corporation, had done no more than erect a lawful improvement to navigation); *cf.* A. C. Conn Co. v. Little Suamico Lumber Mfg. Co., 74 Wis. 652, 43 N.W. 660 (1889) (dispute between party using the river for transporting logs and other party who maintained a dam in the river for water power to run a mill).

5. *See, e.g.*, Ploof v. Putnam, 81 Vt. 471, 71 A. 188 (1908). *See also* Proctor v. Adams, 113 Mass. 376 (1873).

or intermittently. Second, the effecting agency is the government, rather than a private individual. The third difference, a corollary to the second, is that the particular construction presumably has as its purpose an "improvement in aid of navigation." This is the government's justification for its activity. In the absence of a state constitutional provision limiting its power to act,[6] and subject to the overriding power of the federal government, a state under its sovereign powers has the authority not only to regulate its navigable waters, but to authorize and participate in programs for improving them.[7] The federal government, under various provisions of the U. S. Constitution, has the power to effect improvements to navigation in waters subject to federal jurisdiction. Both state and federal governments, in pursuance of these powers, have engaged in activities that have cut off upland owners from the navigable channels, and the courts have been called upon to balance their interests. "Balancing" here is perhaps a misnomer. The activities involved typically result in virtually complete destruction of the riparian's access. But, given the power of the government to undertake improvements, the fact that private interests are adversely affected does not prevent the government from acting. If a balance is to be struck, it must be done in terms of pecuniary compensation to the upland owner.

The federal government was early absolved by the U. S. Supreme Court from the duty to recompense the upland owner for destruction of his access resulting from a federal project. The leading case is *Scranton v Wheeler*,[8] decided in 1900. A full discussion of the plenary power of the federal government over navigable waters, and the long-range impact and

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6. A number of states have had or presently have constitutional provisions limiting or denying the power of the state to engage in internal improvements. These provisions have been construed to prohibit state participation in improvements to navigable waters. *See, e.g.,* WISC. CONST. art. VIII, § 10, *construed in* State v. Froehlich, 115 Wis. 32, 91 N.W. 115 (1902) (State appropriation of $20,000 for construction of levees held invalid); MINN. CONST., art. 9, § 5, *construed in* Rippe v. Becker, 56 Minn. 100, 57 N.W. 331 (1894). *But see* Visina v. Freeman, 252 Minn. 177, 89 N.W. 2d 635 (1958) (approving state participation in port development on theory that this was a "governmental function," and not within the constitutional proscription). The relevant provision of the Michigan Constitution, art X, § 14 (1908), was amended in 1946 to permit the state to engage in development and improvement of waterways and water bodies.

7. *See, e.g.,* Willson v. Blackbird Creek Marsh Co., 27 U.S. (2 Peters) 245, (1829) (State-authorized dam, obstructing navigation, not unlawful when Congress neither authorized nor prohibited it).

8. 179 U.S. 141 (1900) (Federal government in course of improving Sault Ste. Marie erected a pier in front of privately-held upland, cutting off access to channel; held, no liability). For the earlier history of the case, *see* 57 F. 803 (6th Cir. 1893), *rev'd* for lack of jurisdiction, 163 U.S. 703 (1896).

implications of cases like *Scranton v. Wheeler*, is beyond the scope of this discussion. For purposes of the discussion here, it will be sufficient to note that the Court's theory was that there had been no "taking" of property, and hence no duty to pay compensation. The riparian owner acquired the right of access subject to the possibility that such right might become worthless "in consequence of the erection under competent authority of structures on the submerged lands in front of his property for the purpose of improving navigation."[9]

This result was contrary to the position earlier taken by the English House of Lords in *Lyon v. Fishmongers' Co.*[10] Under the authority of the conservators of the River Thames, a fill was to be made in the river bank in such a way as to cut off access to a portion of plaintiff's wharf. The House of Lords held that the plaintiff was entitled to compensation under the relevant statutes[11] because the right of access was a form of enjoyment of the land as well as the water.

> It appears to me impossible to say that a mode of enjoyment of land on the bank of a navigable river which is thus valuable, and as to which a landowner can thus protect himself against disturbance, is otherwise than a right or claim to which the owner of land on the bank of the river is by law entitled within the meaning of such a saving clause as that which I have read.[12]

The state courts which have faced the question have generally followed the lead of the U. S. Supreme Court, particularly when the construction was undertaken by a state agency and resulted in an improvement to the waterway itself.[13] When the improvement was carried out by someone other than a state agency, and did not actually improve the waterway

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9. *Id.* at 164.
10. 1 App. Cas. 662 (1876).
11. There is no constitutional basis for compensation in England, but the various statutes providing for improvements to navigation typically provide compensation for property taken.
12. Lyon v. Fishmongers' Co., 1 App. Cas. 662, 672 (1876).
13. *E.g.*, Henry Dalton & Sons Co. v. Oakland, 168 Cal. 463, 143 P. 721 (1914) (city sea wall constructed in front of upland, blocking access; held, no compensable right of access to deep water over intervening tideland); Home For Aged Women v. Commonwealth, 202 Mass. 422, 89 N.E. 124 (1909) (Commonwealth of Massachusetts erected a sea wall in front of upland owner's property which cut him off from access to the navigable water; compensation denied); *Accord,* Sage v. New York, 154 N.Y. 61, 47 N.E. 1096 (1897) (Public wharves and docks constructed on Harlem River). *Cf.,* Slingerland v. International Contracting Co., 169 N.Y. 60, 61 N.E. 995 (1901) (government contractor in course of dredging Hudson River created spoil bank which resulted in interference with upland owner's access; no recovery).

itself, the courts began to have trouble. The railroad bridge cases are illustrative. Not infrequently, building the bridge necessitated placing support piers and associated structures in the waterway. These structures sometimes blocked the upland owner's access to the channel. The fact that the spanning of the waterway with the bridge had been approved by Congress led some courts to conclude that the project was essentially governmental activity in aid of navigation, and came under the rule of no compensation.[14] Other courts were singularly unimpressed by the argument. They saw no reason why the upland owner should not be compensated for the loss in value of his property resulting from an activity that had no real connection with improving the navigability of the waterway, and that indeed usually produced the opposite result.[15]

Sometimes both counsel and the court became confused over the identity of the issue involved. Was it a question of the riparian's right of access by virtue of his upland ownership, or was it a question of the state's title to the bed in front of the upland and its right to authorize erections on the bed? In *Tomlin v. Dubuque, B. & M. R.R.*,[16] defendant railroad, under authority of a state statute permitting railroad corporations to use, occupy, and enjoy "any lands of the state,"[17] built a section of its roadbed along the shore of the Mississippi River in front of plaintiff's upland. The construction was below the high water mark. Plaintiff claimed damages for destruction of his right of access, and won at the trial level. On appeal by the railroad, plaintiff's counsel stated that,

> The only question raised by this appeal is whether a riparian owner has such an interest in land bordering on the Mississippi River below high water mark as to entitle him to damages from a railway company seeking to occupy it?[18]

The Iowa Supreme Court held that the upland owner owned only to the high water mark, not the low water mark as contended by plaintiff's counsel, and reversed the judgment. Confusion was further compounded when, in the course of its opinion, the Iowa Supreme Court added language that the upland owner on a navigable river "is entitled to no right,

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14. *E.g.*, Fish v. Chicago G.W. R.R., 125 Minn. 380, 147 N.W. 431 (1914).
15. *E.g.*, Northern P. Ry. v. S. E. Slade Lumber Co., 61 Wash. 195, 112 P. 240 (1910); Delaplaine v. Chicago & N.W. Ry., 42 Wis. 214 (1877).
16. 32 Iowa 106 (1871).
17. Iowa Stat., tit. XI, art. 3, section 1328 (1860). The statute has since been repealed, Ch. 35, § 2 [1874] Iowa Pub. Laws 15th Gen. Ass.
18. Quoted in Peck v. Alfred Olsen Constr. Co., 238 N.W. 416 (Iowa 1931), at 419.

either in its shores or waters, as an incident of his ownership, except the contingent ones of *alluvion* and *derelictum*."[19] Subsequent cases cast doubt on the accuracy of this language,[20] and it was expressly overruled in *Peck v. Alfred Olsen Constr. Co.*,[21] although on rehearing the court, in a second opinion, found the *Tomlin* case not controlling on the facts of *Peck*, and declined to further consider it.[22]

When the "improvement" involved the rechanneling of a stream or the diverting of its water, the courts found themselves faced with a similar conflict. As a result of the improvement, the upland owner lost his access; and the particular waterbody lost its navigability, or had it materially impaired. Nevertheless, if the ultimate purpose was to improve navigation on other waterways, some courts held the upland owner's loss noncompensable.[23] Other courts, finding no intent on the part of the government to improve the channel or bed of the waterbody concerned, refused to classify the upland owner's loss as the price of progress, and made the government compensate him. For example, in *Beidler v. Sanitary District of Chicago*,[24] plaintiff owned lands abutting on and near the Chicago River. His predecessor in title had dug large canals extending from the river through the upland property. These canals provided navigable channels for vessels from Lake Michigan coming up the Chicago River to the wharves and docks built along the property fronting on the canals. Plaintiff leased these properties, obligating himself in the leases to maintain sufficient water in the canals for access for vessels to the leased premises.

The Sanitary District of Chicago, a governmental district organized under state law, built a sanitary drainage canal, and connected it to the Chicago River in order to obtain the flow of the river to carry its wastes. As a result, the level in the river adjacent to plaintiff's upland and in his canals was lowered six feet. Plaintiff expended some $25,000 in dredging

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19. Tomlin v. Dubuque B. & M. R.R., 32 Iowa 106, 109 (1871).
20. *E.g.*, Renwick v. Davenport & N.W. R.R., 49 Iowa 664 (1878); *see also* Musser v. Hershey, 42 Iowa 356 (1876).
21. 238 N.W. 416, 420 (Iowa 1931).
22. Peck v. Alfred Olsen Constr. Co., 216 Iowa 519, 245 N.W. 131 (1932).
23. *E.g.*, Black River Improv. Co. v. La Crosse Booming & Transp. Co., 54 Wis. 659, 11 N.W. 443 (1882) (one branch of river destroyed to improve navigation on other branch); *see also* Homochitto River v. Withers, 29 Miss. 21 (1855) (state cut new channel, affecting plaintiff's access, rt. of access denied), *aff'd sub nom.* Withers v. Buckley, 61 U.S. (20 How.) 84 (1859). *But see* King v. Vicksburg R. & Light Co., 88 Miss. 456, 42 So. 204 (1906) (overruled Withers because of a change in state const.).
24. 211 Ill. 628, 71 N.E. 1118 (1904).

the canals and rebuilding the docks and wharves to adjust for the lowered level. He then sued the Sanitary District for his damages.

Because the canals had been supplied with water from the river for more than 20 years, the court determined that the diversion of the water to the canals was an appropriation of the water adverse to the rights of other owners of abutting property, and as the appropriation did not violate the public right of navigation, the plaintiff had acquired by prescription the same riparian rights in the waters that he would have had if the canals had been natural waterways. The Sanitary District argued that under the sanitary district act the drainage channel is declared a navigable stream; the diversion of water into the stream was in the interest of and for the purpose of navigation; and the riparian rights of the plaintiff were subject to the right of the government to make improvements to facilitate navigation.

The court agreed that plaintiff's private rights were subject to the public right to improve navigation, but this meant the right to improve navigation in the Chicago River and its tributaries, not the lowering of the water in the river to make navigable an artificial channel for waste carrying. The court pointed out that under the sanitary district act the purpose of the district and its works was to dispose of sewage; the fact that a navigable waterway was created was purely incidental. The court concluded that the lowering of the water level obstructed ingress and egress to the plaintiff's lots, and was a compensable injury under the state's constitutional provision requiring compensation for the taking of, or damage to, private property for public use.[25]

In an interesting Iowa case the judges had some difficulty deciding what structures could be called "in aid of navigation" until counsel for the state helped them resolve the question by displaying some adroitness in his presentation of the state's case.[26] The state was in the process of extending a public street into West Lake Okoboji, a navigable lake, and erecting a turn-around on pilings in the lake. The street entered the lake at an angle, and this plus the thermometer-bulb shaped turn-around had the effect of partially blocking plaintiff's access to the lake from his upland

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25. *See also* Fulton Light, Heat, & P. Co. v. State, 200 N.Y. 400, 94 N.E. 199 (1911); Hewitt-Lea Lumber Co. v. King County, 113 Wash. 431, 194 P. 377 (1920) (lowering of waters of Lake Washington, in connection with ship canal construction, left Mercer Slough dry, isolating mill from navigable part of lake); Madson v. Spokane Valley Land & Wtr. Co., 40 Wash. 414, 82 P. 718 (1905).

26. Peck v. Alfred Olsen Constr. Co., 238 N.W. 416 (Iowa 1931).

amusement park adjacent to the street. Plaintiff appealed from the denial of an injunction. A majority of the Iowa Supreme Court felt that, even though the chief use of the structure was to be a driveway or turn-around for automobiles, "we cannot say that the structure does not have a public use consistent with the use by the public of the lake."[27] The court then summarily concluded that the upland owner was not entitled to compensation for injury to his access, and affirmed the trial court.

Four judges dissented, vigorously pointing out that the state's construction was not for the purpose of improving navigation or uses incident to the water: "In truth, the appellees [state] propose[s] to lessen the general and ordinary uses of the lake and prohibit the carrying on of commerce from appellant's [plaintiff's] land."[28] A rehearing was granted the plaintiff.[29] At the rehearing, however, a new sketch of the proposed structure, labelled "Proposed Public Wharf," was submitted to the court by the state. The sketch showed a boat-landing dock radiating from the turn-around. The court, with the benefit of this new insight into the project, asked itself whether the fact that the proposed wharf and boat landing also provided a convenient turn-around for vehicular traffic prevented the structure from being "in aid of navigation." The court thought not, now all judges concurring, although two of the judges expressed grave doubt as to the bona fides of the new label.[30] Once having categorized the improvement as "in aid of navigation," the Iowa court in a lengthy opinion adopted the principle of no compensation, relying heavily on *Scranton v. Wheeler*[31] and other federal precedents.

II. The Riparian's Right to Navigate

As to the right to navigate—to travel over the surface of the water to distant points, whether for the purpose of transporting to market products grown or manufactured on riparian lands, or for the purpose of having others reach the lands to exchange goods and services, or simply for the purpose of pleasure boating—the riparian owner has at least the same rights as any member of the general public. Against interference by other individuals, the public has a protected right to navigate. But against obstructions erected under federal or state authority, the courts have generally

27. *Id.* at 422.
28. *Id.* at 425.
29. 216 Iowa 519, 245 N.W. 131 (1932).
30. Concurring opinion, 216 Iowa at 533, 245 N.W. at 137.
31. 179 U.S. 141 (1900).

held that the public right to use a waterway as a highway would yield to other public needs when the general good required it, and the Congress or the legislature was the final authority on what was the general good.[32]

But what of the riparian owner whose accessibility to connecting networks of waterways may have been impaired or completely blocked by a government-authorized structure? Was he simply a member of the public, or did he have a protectible property right by virtue of his riparian status? The question is raised, for example, when a government-authorized bridge is built across a navigable waterway. As a result of the structure, ships may no longer be able to reach a riparian owner on the upstream side of the bridge without extensive modification to their superstructures, or perhaps not at all.

Consistent with the federal rule of noncompensability for direct access rights, the federal courts took the position that, as to congressionally-approved projects, there was no compensable right in the riparian for loss of his navigation capability. In *Pennsylvania v. Wheeling and Belmont Bridge Co.*,[33] the complaining upstream riparian was the state of Pennsylvania. The Bridge Company, under express authority of the State of Virginia, erected a bridge across the Ohio River at Wheeling. The bridge did not have a draw, and the clearance was such that the usual packet boats running the Ohio from Cincinnati to Pittsburgh could not pass under the bridge without lowering their stacks, a not inconsiderable project.[34] In the Supreme Court, the Bridge Company argued that the nuisance, if there was one, was a public nuisance, and only the sovereign within whose jurisdiction the nuisance existed could move against it. The Supreme Court answered that if a public nuisance was productive of a specific injury to an individual, he had standing to complain. Pennsylvania was not suing in its sovereign capacity, but in its capacity as an owner of property interests in transportation systems extending inland from Pittsburgh. It was alleged that the value of these systems would be materially diminished if river traffic into Pittsburgh was hindered.[35] The Court then decreed that,

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32. See discussion *infra*, part II of this article.

33. 54 U.S. (13 How.) 518 (1851), *modified*, 59 U.S. (18 How.) 421 (1855).

34. See the dissenting opinion of Justice McLean, 59 U.S. at 437-39, for a detailed description of the physical and financial problems involved.

35. In this case, the State of Pennsylvania is not a party in virtue of its sovereignty. It does not come here to protect the rights of its citizens. . . . Nor can the State prosecute this suit on the ground of any remote or contingent interest in itself. It assumes and claims, not an abstract right, but a direct interest in the controversy, and that the power of this court, can redress its wrongs and save it from irreparable injury. . . .

on the facts, the bridge was an obstruction that unlawfully interfered with plaintiff's navigation rights, and unless it was elevated to a height sufficient for the packets to pass under it, or an appropriate draw constructed, it was to be abated.[36]

Subsequently an act of Congress was obtained specifically declaring the bridge to be a lawful structure in its then existing position and elevation, and authorizing the Bridge Company to maintain it as it stood. The act further required that vessels navigating the river regulate their pipes and chimneys so as not to interfere with the bridge. At a further hearing, the Supreme Court ruled its earlier decree no longer enforceable; the right of navigation upon which the decree had been based had been modified by the Congress, and the bridge was now a lawful obstruction. "There is no longer any interference with the enjoyment of the public right inconsistent with law, . . ."[37] Justice McLean dissented, arguing that while Congress had the power to regulate commerce among the States, it did not have the power to alter facts, and the facts as he saw them and as the Court had seen them earlier, were that the bridge was an unlawful interference with Pennsylvania's riparian rights. He considered the act of Congress void.[38]

Wheeling then seemed to stand for the proposition that an upstream riparian owner who could show special damage from an obstruction to the public right of navigation could challenge the lawfulness of the structure even though it had been specifically authorized by the state legislature, and the question of whether the riparian was damaged would be decided by the courts. But if the structure was expressly authorized by the Congress, its lawfulness was conclusively established, and there was no right in a riparian that the federal courts could recognize. Of course, the final decision in *Wheeling* dealt only with the latter point, the effect of a Congressional declaration. Ten years later, the question of the conclusiveness of a state legislative authorization came before the court again, and this time no supervening Congressional act was involved.

> . . . and so in the present case, the rights asserted and relief prayed, are considered as in no respect different from those of an individual. From the dignity of the State, the constitution gives to it the right to bring an original suit in this court. And this is the only privilege, if the right be established, which the State of Pennsylvania can claim in the present case.

54 U.S. (13 How.) 518, 559 (1851).

36. 54 U.S. (13 How.) 518 (1851).

37. Pennsylvania v. Wheeling and Belmont Bridge Co., 59 U.S. (18 How.) 421, 432 (1855).

38. *Id.* at 437-49.

In *Gilman v. Philadelphia*,[39] Gilman, a private individual, owned a coal wharf downstream of the Market Street Bridge over the Schuylkill River, on the west side of Philadelphia. The Schuylkill River joined the Delaware River below the city. Ships coming up the Delaware could turn into the Schuylkill, and reach Gilman's coal yard. The city undertook to build another bridge across the Schuylkill, just downstream of Gilman's property; the bridge was specifically authorized by a state statute. The effect of the new bridge was to bracket Gilman between the two bridges. As the new bridge was to be built with a 30 foot clearance, and no draw, masted ships which formerly were able to reach Gilman's property could no longer do so. Gilman, claiming diversity of citizenship and unlawful interference with his riparian rights, sued in a federal court to enjoin the building of the bridge. Gilman based his position on *Wheeler*—there was no doubt on the evidence that his riparian property would be materially depreciated in value as a direct result of the new bridge.

The Supreme Court affirmed the Circuit Court's dismissal of Gilman's complaint, on the ground that in the absence of relevant Congressional action, the reserved power of the states over navigable waters was plenary, and the exercise of the power could not be made the subject of federal judicial review. When the question of lawfulness of the structure evaporated, plaintiff's rights as a riparian went with it.[40] The principle that came out of *Gilman*, then, was that the authority of a state over its navigable waters, like the federal government's had been in *Wheeling*, was paramount and unconditioned by private claims, at least as far as the federal courts were concerned.

If the riparian was to have any judicial redress for losses sustained as a result of state-authorized obstructions to navigable waterways, it would have to come from his own state courts, and be based on a state-recognized common law or statutory right. Because the state courts had early agreed with the idea of their state government's paramount authority over navigable waterways,[41] the riparian owner, if he had no better standing than

39. 70 U.S. (3 Wall.) 713 (1865).

40. Three justices dissented on the grounds that, while it was true there was no act of Congress expressly authorizing or prohibiting the bridge, there was relevant Congressional activity in the form of ship-licensing acts and other legislation regulating navigable waters which indicated the intent of Congress to maintain the river as a navigable waterway. Indeed, it was this type of legislation that was cited by the Court in the earlier decree in *Wheeling* as the basis for finding the Wheeling bridge an unlawful obstruction. *See also* The Passaic Bridges, 70 U.S. (3 Wall.) 782 (1857).

41. See discussion, Part III *infra*.

the general public, would be largely at the mercy of the state. The critical question was whether the fact that he was also a riparian owner gave him sufficiently different standing so that he could claim something more.

As a result of history and the intimate connection between the riparian's problem and the problem of public navigation generally, the status of the riparian is not a simple one. An obstruction to a navigable waterway is a public nuisance. Being a riparian owner may be a material consideration in determining whether a navigator has shown the special injury required to be entitled to maintain an action regarding such an obstruction. But riparian status is only one facet of the question of rights and liabilities resulting from obstructions to navigable waters. The details of the question are the subject of the next section.

III. Navigation—Public Rights and Private Claims

A. *Background and Development of the Problem*

The question of whether a navigable waterway shall be kept wholly free for navigation, or whether it shall be invaded with structures deemed necessary to promote other public purposes, is a matter of government policy, to be decided in the first instance by the legislature. The power of the federal government over the navigable waters of the United States is plenary. As against private claims (or contrary state policies), the federal policy as determined by Congress is paramount and conclusive.[42] Furthermore, federal law regards the power of the states over state waters, when not in conflict with established federal policy, as equally paramount and conclusive. This issue was decided at an early date in the case of *Willson v. Blackbird Creek Marsh Co.*[43] The State of Delaware had authorized a dam across a navigable waterway. Because the dam completely blocked movement up or down river, the owner of a large sloop desiring passage broke the dam down. The company that had built the dam sued the sloop owner in trespass; he defended on the ground that the dam was an unlawful obstruction to public navigation. In view of the legislative authority for the dam, the Delaware courts found the defense without merit, and the United States Supreme Court affirmed. Said Chief Justice Marshall:

> [T]he measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have

42. See discussion, Part II *supra*.
43. 27 U.S. (2 Peters) 245 (1829).

> been accustomed to use it. But this abridgement, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance.[44]

The enactment in 1899, of federal legislation prohibiting construction of bridges and dams,[45] and wharves and other obstructions[46] in navigable waters of the United States unless authorized by appropriate federal agency did not change this. The requirements for federal approval are in addition to whatever state requirements are in effect.[47]

In the absence then of a conflicting federal determination, the right of public navigation on a particular navigable waterway in a state is left to the tender mercy of the state government. During the period of this country's industrial development, the state legislatures, in their zeal to establish railroads and highways and to promote water power and other aids to industry, were not always tender, and bridges and dams were frequently authorized. The state courts, with the federal precedents to guide them and the weight of the state legislatures behind them, showed little mercy.

A reading of the cases as the law developed is an interesting window into the policies and politics of state government. Many of the cases that first dealt with these problems came up in the period from 1860 to 1895. This was the great railroad building era. A number of special legislative acts were passed authorizing the building of a particular bridge at a designated location. More often, perhaps, the legislatures in the charters given to railroad and bridge companies simply gave a general consent to the erection of bridges over navigable waters of the state. Even if the charter did not specifically mention the erection of bridges, the authority to construct a railroad between designated points was recognized as sufficient to give the railroad company the authority to erect bridges over navigable waters.[48] But the general grant of authority to build a bridge did not, in the eyes of some judges, include the authority to unduly obstruct the navigable capacity of the waterway. Some obstruction of course was inevitable, but if a structure obstructed the waterway in excess of

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44. *Id.* at 251.
45. 33 U.S.C. § 401 (1899).
46. 33 U.S.C. § 403 (1899).
47. Lake Shore & Mich. S. Ry. v. Ohio, 165 U.S. 365 (1897).
48. *E.g.*, Fall River Iron Works Co. v. Old Colony & F. R.R., 87 Mass. (5 Allen) 221 (1862). State *ex rel.* Pettee v. Stevens, 1 N.J. Eq. 369 (1831).

the authority granted, it was a public nuisance, and could be abated.[49] Furthermore, the obstructer became liable for injuries caused by his obstruction.[50]

The questions then became: (1) had a particular structure been properly authorized; and if so, (2) had it been constructed within the scope of the authorization. But before these questions could be asked, a preliminary matter had first to be determined: who was entitled to ask them? If the answers were to be sought in a court,[51] the court would want to know whether the challenger had a legal right to an answer. If the challenger was an appropriate state official, representing the sovereign, there was no problem. An unlawful obstruction to a navigable waterway was similar to an unlawful obstruction to a public highway. It was a public nuisance, and the public through its representatives was entitled to have the nuisance abated.

More often, however, the challenger was an individual who wished to have the waterway used for navigation, and who found the structure to be an impediment to such use. He might have been a ship owner, making his living transporting goods and people up and down the waterway. He might have been an owner of a wharf used by the ships, who wanted to keep the ships coming. He might have been a manufacturer who got his materials and moved his products to market via the waterway. Today he may simply be a pleasure boat owner, enjoying some of the new leisure. The doctrine, again by analogy to the highway cases, developed that judicial consideration could not successfully be sought by just any individual who decided to become a self-appointed spokesman for the injured public. A challenger had to show that he was special—that somehow he suffered an injury different in kind from the public at large. The details of this showing will be discussed more fully below.

Let us assume for the moment that the required showing has been made. What then? Analytically, the questions then before the court were those mentioned earlier: (1) was the structure authorized; and (2) was it erected in compliance with the authorization. If the authorization was general, and if the court would not read into such a general authorization the power to substantially obstruct navigation, the court was then faced

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49. *E.g.*, State v. Freeport, 43 Me. 198 (1857) (Abatement by public official); Selman v. Wolfe, 27 Tex. 68 (1863) (Self-help).

50. *E.g.*, Southern Ry. v. Ferguson, 105 Tenn. 552, 59 S.W. 343 (1900); Gates v. Northern Pac. R.R. 64 Wis. 64, 24 N.W. 494 (1885).

51. For non-judicial remedies available to the individual, see Part III, subsection E *infra*.

with determining whether the limited authorization to build, but not to unduly obstruct, had been exceeded. This meant taking evidence on the uses to which the waterway had customarily been put, and on the particular uses being hindered by the obstruction. When the case was brought to the court by a private individual, as opposed to a state official, the evidence of prior usage and resultant injury was primarily focused on the challenger's own activities. This was also the evidence that bore on the question of whether the challenger had the special injury needed to entitle him to bring the challenge. As a result, the early cases are a curious blend of facts and issues. It is sometimes hard to tell whether the challenger lost because he did not show the special injury needed to challenge or because his injury, if any, was *damnum absque injuria* in the absence of a showing of undue obstruction. When the challenger won, the same evidence that proved special injury also established that the structure was an unreasonable obstruction to navigation and thus exceeded the legislative authorization.

In the following analysis, based on early cases as well as some of the more recent ones, an attempt will be made to isolate the operative variables which appear to have become significant. The cited cases at least are consistent with the thesis stated, and in most instances directly support it. It must be emphasized, however, that the tendency on the part of counsel and courts to blend the issues into a confused amalgam requires some distortion in the process of separating them.

B. *Showing Special Injury—The Commercial Navigator*

The fact that the challenger makes his living transporting goods and people up and down the waterway, and that his business will to some degree be injured because of the obstruction, does not appear to be enough to entitle him to judicial challenge.[52] For example, a steamboat operator could not maintain a suit to recover damages for interruption of his general transportation business on a river obstructed by a railroad bridge, since all who navigated the river were exposed to the very same injury.[53] But what if the navigator has a contract to transport certain goods, and

52. *See, e.g.*, Depew v. Board of Trustees, 5 Ind. 8 (1854); Hamilton v. Vicksburg S. & P. R.R. 34 La. Ann. 970 (1882). *But see* Southern Ry. v. Ferguson, *supra* note 50 (recovery allowed when legislative authorization did not extend to bridge that interfered with navigation).

53. South Carolina Steamboat Co. v. Wilmington C. & A.R.R., 46 S.C. 327, 24 S.E. 337 (1896). *But see* Gates v. Northern Pac. R.R., *supra* note 50 (recovery allowed on similar facts; bridge held an unreasonable obstruction).

the obstruction prevents him from doing so? In a Maine case in which the plaintiff contracted to carry sand and ballast down river, and the defendant's boom blocked the river, the court found the plaintiff had suffered a special injury.[54] On almost identical facts the Minnesota Supreme Court reached the opposite conclusion,[55] although in a later Minnesota case the court thought the decision was probably wrong.[56] In the latter case, the Minnesota court noted that there was a marked conflict as to what constitutes special injury and that the adjudicated cases were irreconcilable. In that case, the plaintiff's logs were blocked by an obstruction created by another logger. The obstruction was a public nuisance and the court seemed to liberalize the special injury requirement:

> It would be highly unjust and inequitable to say that he has no right of redress in a private action, on the ground, merely, that the injury had resulted from an act which is a public offense in itself, and because other persons might have been injured and damaged in the same manner and to the same extent, had they met the obstruction under like circumstances.[57]

C. *Showing Special Injury—The Riparian Owner*

A number of the cases involve upstream riparian owners who, as a result of the construction downstream of a bridge or dam, can no longer carry on their customary activities in connection with the waterway. The cases here are equally in conflict, and some of them are equally irreconcilable. It is possible to make some sense of the area, however, as long as it is recognized that for every case that supports one view of the problem another case with equally vague facts can be found suggesting a different view.

The mere fact that the upstream owner's potential accessibility to other waters has been hindered or even destroyed does not seem to be enough to establish a special injury. The fact that at some future time he planned to develop his property with wharves and docks, or that at some time in the past the property was so used, is too speculative as an injury.[58]

If the upstream owner can show that navigation on the river is presently an important aspect of his business, additional considerations

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54. Dudley v. Kennedy, 63 Me. 465 (1874) (obstruction unauthorized).
55. Brennan v. Lammers, 46 Minn. 209, 48 N.W. 766 (1891) (contract entered into with knowledge of the obstruction).
56. Page v. Mille Lacs Lumber Co., 53 Minn. 492, 55 N.W. 608 (1893).
57. *Id.* at 609.
58. *E.g.*, Potter v. Indiana & L.M. Ry., 95 Mich. 389, 54 N.W. 956 (1893).

must be examined. Evidence of the extent to which navigation to his premises has been hampered becomes relevant, not to the separate issue of compliance with the authorization to construct, but to the question of whether there has been a special injury. Thus, when the evidence showed that the structure had not blocked the river in any material way the challenger failed to establish his right to challenge.[59] But when the upper owner has established that the blockage was substantially complete, at least to the extent of keeping boats from servicing his property, and that as a result he has suffered losses, he has been allowed to recover.[60] In one case,[61] a brickyard owner sued defendant railroad for loss of use of his boats and loss of profits on his sales resulting from defendant's bridge obstructing the river downstream. Defendant's demurrer was overruled—since the plaintiff was shut off from the channels of trade, he had established his allegation of special damages. In another case,[62] involving a manufacturing concern that could no longer transport needed material in its boats from its downstream property to its property above defendant's bridge, judgment for plaintiff was affirmed on the liability issue, although remanded for a redetermination of the damages. The court allowed damages for loss of use of the boat, for the wages of the crew, and—if the plaintiff had transported the goods by other means—for the reasonable cost of such transportation. The plaintiff, however, left the cargo exposed and the resulting injury was held not to have been caused by the defendant's obstruction. Defendant's argument that plaintiff should be considered merely a commercial navigator because he also used his boats as common carriers was given short shrift by the court.

The legislature may relieve the complainant of his burden of proving

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59. Chicago & Pacific R.R. v. Stein, 75 Ill. 41 (1874) (testimony indicated boats could still dock); Harvard College v. Stearns, 81 Mass. (15 Gray) 1 (1860) (no actual hinderance or obstruction shown); Dover v. Portsmouth Bridge, 17 N.H. 200 (1845) (no showing that navigation was obstructed); Marine Air Ways v. State, 201 Misc. 349, 104 N.Y.S.2d 964 (Ct. of Cl. 1951), *aff'd,* 116 N.Y.S.2d 778 (App. Div. 3d Dept. 1952).

60. Frink v. Lawrence, 20 Conn. 117 (1849) (defendant's piles obstructed access to plaintiff's wharf); Rogers v. Kennebec & Portland R.R., 35 Me. 319 (1853) (railroad culvert blocked plaintiff's logs); Stofflet v. Estes, 104 Mich. 208, 62 N.W. 347 (1895) (reconstructed bridge cut off use of stream); Hickok v. Hine, 23 Ohio St. 523 (1872) (reconstructed bridge would prevent access to plaintiff's warehouse and landing, injunction granted); Barnes v. City of Racine, 4 Wis. 474 (1854) (same, injunction granted).

61. Mehrhof Bros. Brick Mfg. Co. v. Delaware, L. & W. R.R., 51 N.J.L. 56, 16 Atl. 12 (1888).

62. Farmer's Coop. Mfg. Co. v. Albemarle and Raleigh R.R., 117 N.C. 579, 23 S.E. 43 (1895). *See also* Armistead v. Shreveport and Red River Valley R.R. 108 La. 171, 32 So. 456 (1901).

special injury. A statute may give a riparian owner a cause of action against an unauthorized obstruction;[63] it may give a navigator liquidated damages of 10 dollars per day for delays caused by a dam;[64] or it may be construed to require the payment of the expense incurred by steamboats in installing hinges on the smokestacks so as to permit the boats to pass under the bridge.[65]

Another factor that seems to have influenced the outcome of some cases, in addition to a showing of substantial injury to business interests, is the proximity of the obtruction to the riparian's property. A bridge with its abutments placed in the water immediately in front of a riparian's property may be a question of access and an interference with recognized property rights, whereas the same bridge downstream may become merely a matter of navigation, even though the bridge in either location effectively blocks the riparian's accessibility to other waters.[66]

At what point does the obstruction cease being a matter of public nuisance, and become a question of private rights? What of an obstruction placed across the narrow upper reaches of a river immediately below a riparian's property? In *Leitch v. Sanitary District of Chicago*,[67] plaintiffs, who owned property on the Chicago River, sued to enjoin the Sanitary District and the City of Chicago from building a bridge and sewer and water mains across the river downstream of their property. Plaintiffs alleged that the river was navigable up to their property, and had been used for years for waterway transportation to and from plaintiffs' docks and wharves. They further alleged that the mains built across the bed of the river and the bridge built over the river would destroy navigation to their property. It appeared that the structures were to be built immediately downstream and adjacent to the plaintiffs' land.

Plaintiffs first brought their action in the federal court, but the court held it was without jurisdiction over the case, and this was affirmed on appeal.[68] Plaintiffs then went to the state court; the trial court dismissed

63. Bailey v. Philadelphia Wilmington and Baltimore R.R., 4 Del. 389 (1846) (holding such a statute constitutional even though enacted after the injury but holding a statute giving a cause of action against authorized obstructions unconstitutional as a violation of obligation of contract).

64. Hogg v. Zanesville Canal & Manufacturing Co., 5 Ohio 410 (1832) (held plaintiff not limited to statutory damage when his boat was lost).

65. State v. South Carolina R.R., 28 S.C. 23, 4 S.E. 796 (1888).

66. For an opinion clearly recognizing the importance of this distinction, see Marine Air Ways v. State, 201 Misc. 350, 104 N.Y.S.2d 964, 967 (Ct. of Cl. 1951), *aff'd*, 116 N.Y.S.2d 778 (App. Div. 3a. Dept. 1952).

67. 369 Ill. 469, 17 N.E.2d 34 (1938).

68. Leitch v. City of Chicago, 41 F.2d 728 (7th Cir. 1930).

their complaint. On appeal, the Illinois Supreme Court reversed, holding that the plaintiffs had stated a cause of action. "[T]he plaintiffs stated facts which give them certain valuable rights as riparian owners on running water; . . . defendants were doing acts which impaired those rights."[69] The court did not clarify exactly what kind of rights were involved, whether rights of access or of navigation. The case was remanded and later tried. At the trial, after hearing, the chancellor found against the plaintiffs, and again dismissed the complaint. The evidence at the trial established that the bridge was built by the State of Illinois. The State had been a party defendant at the trial level, but had been dismissed for reasons not given. Evidence further established that the removal of only the sewer and water main structures would not benefit the plaintiffs, as the bridge would still constitute a permanent obstruction to shipping. On appeal, in view of the fact that the defendants then before the court did not have jurisdiction over the bridge, the court declined to issue an injunction since it felt that an order that would require the mains to be removed would have been useless under the circumstances.[70]

The same problem arises when the riparian owner's land is on a cove or basin, and the cove opens into a substantially larger body of water. In an early Iowa case a fish camp owner had his place of business at one end of a long (5-6 mile), narrow lake. A railroad bridge located one mile from the fish camp had been constructed in such a way as to block the fish camp owner's customers from reaching the remainder of the lake in their boats. The Iowa court held that the camp owner had no basis for recovery for the obstruction of public navigation.[71] Perhaps the mile-long stretch of lake available to him was enough to keep the fish camp operator in business.

In a recent Florida case, another fish camp operator felt his situation was substantially different, and the court agreed.[72] Mr. Giddens had purchased a parcel of land located on a small arm of a navigable landlocked body of water. He set himself up in the business of renting boats to people who came to fish. To reach the main part of the lake his customers passed under a wooden state highway bridge that stretched across the arm of the lake. The State Road Department, in the course of improving the highway, removed the wooden bridge and built a fill completely spanning

69. 369 Ill. 469, 475, 17 N.E.2d 34, 37.
70. Leitch v. Sanitary Dist. of Chicago, 386 Ill. 433, 54 N.E.2d 458 (1944).
71. Innis v. Cedar Rapids, I.F. & N.W. Ry., 76 Iowa 165, 40 N.W. 701 (1888). (The court noted the additional factor that the fish camp operation had not been started until four or five years after the bridge was built).
72. Webb v. Giddens, 82 So.2d 743 (Fla. 1955).

the area and effectively blocking Giddens and his customers from the main part of the lake.[73] Giddens sought a declaratory judgment as to his right to access from his land to the main body of the lake. The chancellor rejected the Road Department's argument that Giddens' riparian rights ended when he reached the water from his uplands, and decreed that he had the legal right to access to the main body of the lake for purposes of fishing, hunting, and boating. On appeal, the Florida Supreme Court, citing an earlier Florida case[74] for the proposition that one of the common law riparian rights was the right of ingress and egress to and from the water over the owner's land, stated that the question before the Court was whether the denial of ingress and egress deprived Giddens of "a practical incident of his riparian proprietorship."[75] The court held that Giddens' right of ingress and egress would be virtually meaningless unless he were allowed access to the main body of the lake. The decree of the lower court was affirmed.[76]

D. *Legal Authorization as a Variable*

One of the major factors that determines the rights and liabilities in regard to obstructions in navigable waters is the extent to which the obstruction has been authorized. There are three key questions: (1) has the obstruction been authorized; (2) what is the extent of the authorization; and (3) has the structure been built in conformity to the authorization?

If a structure or other object obstructs the navigability of the water, and the obstruction is without any legal authority, it is a public nuisance and the state may abate it[77] or bring a criminal action against the person creating the nuisance.[78] A private individual who has sustained special injury may also bring an action to abate or enjoin the nuisance[79] or to recover damages caused by the obstruction.[80]

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73. The road across the arm of the lake contained a large culvert connecting the arm with the main lake, but the trial court specifically found that the culvert did not provide a practical means of access by boat; the culvert was apparently completely submerged for about 18 months after it was installed.

74. Thiesen v. Gulf F. & A. Ry., 75 Fla. 28, 78 So. 491 (1918).

75. 82 So.2d 743, 745.

76. *See also* Easton & A. R.R. v. Central R.R., 52 N.J.L. 267, 19 Atl. 722 (1890). *Contra,* Frost v. Washington County R.R., 96 Me. 76, 51 Atl. 806 (1901) (Federal authorization of bridge blocking egress from cove was controlling).

77. State v. Freeport, 43 Me. 198 (1857).

78. *See* State v. Godfrey, 24 Me. 232, 41 Am. Dec. 382 (1844).

79. Frink v. Lawrence, 20 Conn. 117 (1849).

80. Gulf Atlantic Transp. Co. v. Becker County Sand & Gravel Co., 122 F. Supp. 13 (E.D.N.C. 1954); *see* Toy v. Atlantic Gulf & Pacific Co. 176 Md. 197, 4 A.2d 757 (1939) (dictum).

If the obstruction has some basis of legal authority, the problem becomes more difficult. As noted previously, the courts have generally recognized that, absent a preempting federal position, the state legislature has plenary power to partially or completely obstruct an otherwise navigable river.[81] The theory is that the legislature determines the policy that best promotes the public interest and "its decision is wholly political, and its policy may not be reviewed."[82]

What is the effect of authorization? A bridge or dam which blocks or impedes navigation may give a riparian owner or navigator a cause of action on the theory that the obstruction is a public nuisance and that he, in some manner, has sustained a special injury differing in kind and degree from the public at large.[83] If, however, the complainant fails to prove that the obstruction is unauthorized or that it exceeds the authorization, his injury is *damnum absque injuria* because that which is legally authorized cannot be a public nuisance.[84] The apparent harshness of this doctrine is softened by judicial construction of the authorizing statutes and sometimes by the express terms of the statutes. When the legislature authorizes a bridge or other impediment and the authorization is couched in general terms, the courts have been unwilling to construe such authorization to permit an obstruction to the navigable capacity of the waterway. In *Hickock v. Hine*,[85] a plank road company was incorporated by special act of the legislature with power to construct a road with all "necessary appurtenances and appendages, doing no unnecessary damage."[86] As against a claim by a riparian owner that his warehouse and landing would be blocked by a proposed bridge, the court held that the power to obstruct navigation must be expressly granted and, in the absence of such a grant, a statute confers no power to obstruct the navigability of a river. There is then no implied authority to obstruct a navigable river.[87] In addition, the complainant may

81. *E.g.*, Escanaba Co. v. Chicago, 107 U.S. 678 (1882); Selman v. Wolfe 27 Tex. 68 (1863). *But see* Depew v. Wabash & Erie Canal, 5 Ind. 8 (1854) (limiting power over interstate streams to reasonable obstructions).

82. St. Regis Paper Co. v. New Hampshire Water R. Board., 92 N.H. 164, 174, 26 A.2d 832, 840 (1942).

83. For a discussion of what constitutes special injury see discussion part III, subsections B and C *supra*.

84. Milnor v. New Jersey R.R., 70 U.S. (3 Wall.) 782 (1857); Rogers v. Kennebec & Portland R.R., 35 Me. 319 (1853); Wood v. Rice, 24 Mich. 422 (1872); Woodward v. Webb, 65 Pa. 254 (1870); Ensworth v. Commonwealth, 52 Pa. 320 (1866).

85. 23 Ohio St. 523 (1872).

86. *Id.* at 529.

87. Terre-Haute Drawbridge Co. v. Halliday, 4 Ind. 36 (1852) (corporate charter does not authorize obstruction); Thompson v. Paterson & Hudson River

find support if the legislature has specifically recognized a stream as navigable and made the obstruction of navigable streams a misdemeanor. In this situation, a special act authorizing a bridge, without expressly authorizing obstruction, will not be construed to permit an obstruction of the river.[88]

A common type of authorization statute, and the one that affords the complainant the best opportunity to recover, provides for construction of a particular bridge or dam and then contains an express caveat that the structure be designed so as not to obstruct navigation. Under such a statute, the court will consider the evidence to determine if, in fact, the structure does unreasonably obstruct navigation. To the extent that the bridge or dam exceeds the authorization the structure is a public nuisance.[89] To illustrate this point, in an early Ohio case[90] the defendant was authorized to construct a dam provided that the dam contain a lock which would be opened without delay, and that the dam be kept in repair so as not to impede navigation. The court interpreted the statute to say to the defendant: "you may build your dam, construct your lock and canal. You shall do it in a particular manner. But you do it at your own peril."[91] The plaintiff brought an action for damages when, because sand and driftwood made it impossible to open the lock, he lost his boat going over the dam. A judgment for the plaintiff was affirmed on the ground that the defendant, in violating the statute, had created a public nuisance.

There is another alternative that might be open to the complainant. An authorization statute, with or without the caveat of not impairing

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R.R., 9 N.J. Eq. 526 (1853) (slight obstruction is never a nuisance but authority to substantially impair navigation must be express); New York v. Brooklyn Borough Gas Co., 201 Misc. 672, 105 N.Y.S.2d 459 (Sup. Ct. 1951) (power to lay gas pipes and do all things necessary for supplying gas does not give by implication the power to obstruct navigation); Southern Ry. v. Ferguson, 105 Tenn. 552, 59 S.W. 343 (1900) (general authority to build bridges does not confer power to seriously interfere with navigation).

88. Selman v. Wolfe, 27 Tex. 68 (1863).

89. Rogers v. Kennebec & Portland R.R., 35 Me. 319, 319 (1853) (bridge authorized, "*provided* said bridge or causeway shall be so constructed as not to obstruct or impede the navigation of said waters,"); State v. Godfrey, 24 Me. 232, 41 Am. Dec. 382, 234 (1844) (dam authorized, "provided . . . free passage . . . shall not be impaired, lessened or impeded," Easton and McMahon v. New York Long Branch R.R., 24 N.J. Eq. 49, 51 (1873) (authorization for a bridge provided "suitable and sufficient draws should be made . . . so as not to obstruct the navigation thereof,"); Ensworth v. Commonwealth, 52 Pa. 320, 322 (1866) (provided in act authorizing dam that such dam "shall not obstruct or impede the navigation").

90. Hogg v. Zanesville Canal and Mfg. Co., 5 Ohio 410 (1832).

91. *Id.* at 417.

navigation, may provide with some specificity that the bridge or dam be built in a particular manner. The plaintiff can then challenge the structure as not being built in accordance with the statute. Thus, where the statute calls for the bridge to be built so that the draw and piers are "on a line with the course of river," a navigator may obtain an injunction against the construction of a proposed bridge whose draw and piers were to be placed at an angle to the current, thereby impairing navigation.[92] Similarly, a navigator may question the height of a bridge as being lower than required by statute,[93] or he may contend that a dam was built higher than authorized by statute;[94] but he bears the burden of proof and his suit must fail unless he clearly establishes that the structure is unauthorized as constructed.[95]

E. *Alternative to Judicial Relief: Self-Help*

There was little question at common law that one who sustained special injury from an obstruction to navigation which constituted a public nuisance had the right to peaceably abate the obstruction by his own action, and would incur no liability thereby so long as he exercised reasonable care and abated no more of the obstruction than was necessary for the enjoyment of his lawful rights.[96] The right of an individual to remove obstructions impeding the public's right to navigability is considered analogous to the right to remove obstructions erected upon the public highways and has long been recognized at common law as a proper remedy to abate a public nuisance.

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92. Thompson v. Paterson and Hudson River R.R., 9 N.J. Eq. 526 (1853). *See also* Stephens & Condit Transp. Co. v. Central R.R., 34 N.J.L. 280 (1870), for a similar factual issue.

93. State v. So. Carolina R.R., 28 S.C. 23, 4 S.E. 796 (1888) (42 ft. minimum height required even when height of river bed rose).

94. Arpin v. Bowman, 83 Wis. 54, 53 N.W. 151 (1892) (legal height 3 ft. above low water mark; dam 6 ft. above low water mark illegal and a nuisance.)

95. Silver v. Missouri Pac. Ry., 101 Mo. 79, 13 S.W. 410 (1890). *See also* Bowes v. Chicago, 3 Ill.2d 175, 120 N.E.2d 15, *cert. denied,* 348 U.S. 857 (1954).

96. *See, e.g.,* McLean v. Mathews, 7 Ill. App. 599 (1880) (defendants removed plaintiff's half sunken boat which was obstructing navigation upon the Chicago River); Marion v. Tuell, 111 Me. 566, 90 A. 484 (1914) (defendant, a logger, damaged plaintiff's bridge by using dynamite to loosen a log jam caused by the pins of the bridge which spanned a navigable river); Arundel v. M'Culloch, 10 Mass. 70 (1813) (defendants removed or damaged portions of bridges in order to navigate their boats upon navigable streams); State v. Parott, 71 N.C. 311 (1874); Beach v. Schoff, 28 Pa. 195 (1857) (defendant, raft runner, removed portion of plaintiff's raft which obstructed the passage of his raft upon a navigable stream); Selman v. Wolfe, 27 Tex. 68 (1863).

> It is a settled principle of the common law, that whatever obstructs travel in public highways and navigable streams is a common or public nuisance, which may be removed and abated by any of the King's subjects.[97]

Thus, in *Marion v. Tuell*,[98] a logger successfully defeated an action for damages which he inflicted upon a public bridge by alleging that the bridge constituted a public nuisance. He maintained that the bridge had impeded the flow of his logs, and that his use of dynamite to loosen the jam from the pins of the bridge was reasonable and necessary to enable him to enjoy his lawful use of the river. The court said,

> The true theory of abatement of nuisance is that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action; and also, when a common nuisance obstructs his individual right; he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing.[99]

What constitutes an "obstruction" of "his individual right" has not been interpreted as broadly as the above statement might indicate, however, for it seems to be an established principle that:

> a public nuisance can be abated by a public officer, except where the party who desires to abate it has some *special interest* in the abatement which is different from and greater than the interest of the community.[100]

Another court has said, "A mere intermeddler, who has no occasion to intervene for the protection of *substantial rights of his own*" cannot justify his abatement of a nuisance by a mere showing that a public nuisance in fact exists.[101]

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97. McLean v. Mathews, 7 Ill. App. 599, 602 (1880).

98. 111. Me. 566 (1914).

99. *Id.* at 571-2, quoting from Brown v. Perkins, 78 Mass. (12 Gray) 89, 101 (1858).

100. Griffith v. Holman, 23 Wash. 347, 350 (1900) (emphasis added). *See also* Larson v. Furlong, 50 Wis. 681, 8 N.W. 1 (1881) (defendant, a competing dock owner, held liable for the removal of plaintiff's dock which extended into waters of a navigable lake on the grounds that even if the dock constituted a public nuisance he was not individually injured).

101. Toothaker v. Winslow, 61 Me. 123, 131 (1872) (emphasis added) (defendant who hoisted gate on a dam thereby reducing the level of water behind the dam to the plaintiff's injury alleged the dam constituted a public nuisance which he as a member of the public could summarily abate).

A private nuisance is generally distinguishable from a public nuisance in that a private nuisance exists only where one sustains an injury to a right which he alone enjoys by virtue of an interest in land. But it has also been recognized that "a public nuisance may also become a private nuisance as to any person who is especially injured by it to any extent beyond the injury to the public."[102]

It would thus appear that the right to exercise the non-judicial remedy of self-help to abate a public nuisance only arises when the public nuisance becomes a private nuisance to the one seeking to abate it. In effect, the remedy of self-help to abate a public nuisance cannot embrace any greater rights than could be enforced by the individual through a judicial proceeding. The self-helper, when faced with a subsequent suit challenging his actions, must therefore bear the burden of justifying them by showing that a public nuisance existed and also that he was specially injured.

What constitutes a *special injury* is not altogether clear or easily predicted in any particular instance. The requirement of showing a special injury to justify the exercise of self-help would appear to render the remedy a risky proposition in all but the most clear circumstances. The risks inherent in exercising self-help to abate a nuisance are further increased whenever the obstruction impeding navigation consists of a governmentally authorized structure. The question of whether such authorization has diminished or abrogated public navigation rights is crucial to the self-helper's justification for removing the obstruction, for if no public rights exist he will be held responsible for any damages he might cause.[103]

The nature of self-help naturally gives rise to other limitations on its lawful use. The common law right to abate a nuisance extends only to such acts as are reasonable and necessary to enable the individual to enjoy his lawful rights.[104] The self-helper has a duty, "to do as little damage as was consistent with the accomplishment of his purpose . . . , to do only what was reasonable and necessary to attain his end."[105] Failure to use

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102. Mitchell Realty v. West Allis, 184 Wis. 352, 372, 199 N.W. 390, 397 (1924).

103. *See, e.g.,* Willson v. Blackbird Creek Marsh Co., 27 U.S. (2 Peters) 105 (1829) discussed *supra.* It was held that state authorization to construct a dam across a navigable stream abrogated the public rights to navigation and a self-helper had no justification for abating this obstruction. *But see* State v. Parrott, 71 N.C. 311 (1874); Selman v. Wolfe, 27 Tex. 68 (1863). Despite governmental authorization of bridges, self-helpers were justified in removing those portions which obstructed the navigation of their boats.

104. Liles v. Cawthorn, 78 Miss. 559 (1900) (defendant, mill owner, completely destroyed lower riparian mill owner's dam which was interfering with the operation of his mill).

105. Marion v. Tuell, 111 Me. 566, 572, 90 A. 484, 486 (1914).

reasonable care, or doing more damage than is necesary to enable the self-helper to exercise his rights, may subject him to liability.[106] The proper exercise of self-help does not appear to encompass the right to breach the peace or use force to abate a public nuisance, and there is some authority for the proposition that an innocent person injured as a result of a self-helper's actions may have a cause of action against him.[107]

The number of "ifs" inherent in the exercise of self-help mitigates against its conscious use as a remedy to abate a suspected nuisance. Its principal value would appear to be an after-the-fact defense and even for this purpose its real worth is doubtful at best. Self-help has all but disappeared from the modern cases.

IV. Conclusion

In the historical context of the shift from an eighteenth century agrarian economy utilizing water-oriented transportation to a twentieth century industrial empire built on high-speed land transport, the low priority status given to inland navigation by the legislatures perhaps made good sense. The unwillingness of the courts to become involved in balancing the rights of the individual navigator against this legislative policy is also understandable, and suggestive of sound judicial restraint.

Today, however, the social, political, and economic context is quite different. The new leisure has re-created a significant social demand for unobstructed navigation on the nation's lakes and rivers. Recreational boating has become a national pastime, as well as a major industry. Waterfront residences are objects of demand and acquire high value, largely because of their immediate access to networks of waterways.

At the same time, the resolution of conflicts between the navigators and the obstructors no longer remains a matter of clear legislative policy. Frequently the decision is made today by administrative agencies—the highway engineers, the flood control district planners. The natural tendency is for the agency to choose the simplest, and therefore the cheapest, way to achieve its agency purpose. Little balancing of other significant social interests, and even less consideration of private concerns, may occur. If a reweighing of the affected interests is to take place, it may well be that the courts will have to accept a more active role.

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106. *E.g.*, Beach v. Schoff, 28 Pa. 195 (1857); Marion v. Tuell, *supra* note 105; Selman v. Wolfe, 27 Tex. 68 (1863).

107. Porter v. Allen, 8 Ind. 1 (1856), (defendant removed obstruction, a large log, and five years later plaintiff's boat ran upon the log where the defendant had placed it and was sunk).

This point is well illustrated by a recent decision in Florida, a state in which waterborne recreational interests are of undoubted social and economic importance. *Carmazi v. Board of County Commissioners*[108] presented the question of whether cutting off access by boat to Biscayne Bay from waterfront property on Little River was a deprivation of a property right. Little River is a navigable stream running through the City of Miami and emptying into Biscayne Bay. Dade County had previously constructed a dam across the river some distance upstream from the point where the river joins Biscayne Bay. The effect of the dam was to block egress by boat to the bay for any riparian owners upstream of the dam. It also prevented passage up or down the river past the site of the dam for any members of the public. In 1956, two owners of property above the dam brought suit against the county for an adjudication of their rights and for damages.[109] While the suit was pending, the Central and Southern Florida Flood Control District, a state agency,[110] petitioned to intervene. The Flood Control District proposed to construct a salt water intrusion dam across Little River considerably further downstream. The petition was granted, and additional parties—the riparian owners along the stretch of the river between the old county dam and the site of the new district dam—were impleaded. In its final decree the trial court found no encroachment upon the property rights of these "riparian owners."

The district court of appeal[111] distinguished the riparian owner's right to launch his boat in the water immediately adjacent to his property from his right to navigate. He had no private right to navigate on public waters; his right to navigate was a public right which accrued to him because he was a member of the public and not because of any particular riparian status that he might have. Once the district court concluded that the plaintiff's rights were in fact merely public rights, it dealt summarily with them. The court stated, "[I]t has long been recognized that governmental functions, although they may deprive private interests of certain privileges, are justified as a necessary exercise of the police power for the benefit of the public."[112] Yet the only statement in the opinion concerning the necessity for this exercise was that "the necessity for the dam has been

108. 108 So.2d 318 (3d D.C.A. Fla. 1959).
109. This suit was eventually dismissed at the trial level.
110. FLA. STAT., §§ 378.1 to 378.51 (1959).
111. An appeal was taken directly to the Supreme Court, which held that it was without jurisdiction to entertain the appeal, and the cause was transferred to the Court of Appeals for the Third Circuit.
112. 108 So.2d 318, 323 (3d D.C.A. Fla. 1959).

found to be in the public interest by a solemn pronouncement of the Congress of the United States."[113]

It may be true that the solemnity with which Congress acts is a consideration, but it seems equally true that before the citizens of Florida or any other state are deprived of the use of the state's navigable waterways, other factors should also be considered. Even assuming that the salt-water intrusion problem in the Little River area is serious enough to warrant interference with public navigation—and there appears to be ample evidence that this is the case[114]—there is nothing in the *Carmazi* opinion to indicate that consideration was given to finding alternatives which would strike a balance between the competing interests. One alternative might have been to require the Flood Control District to provide a means for boats to bypass the dam. Such structures are familiar parts of the Florida waterscape.[115] This requirement could properly have been made a condition to the withholding from the riparians of the broader relief of prohibiting the dam.[116]

There are undoubtedly other alternatives that could have been explored. But the basic question remains: in which forum can they be explored? So long as special purpose agencies are given general grants to act in ways which significantly affect other important social interest, as here, it would appear that the courts have an obligation to provide an effective forum—before the fact, not after—for adjusting the tensions between these interests.

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113. *Ibid.*

114. See WATER RESOURCES OF SOUTHEASTERN FLORIDA 580-91 and plate 17 (1955) (Geological Survey Water-Supply Paper 1255), documenting the steadily worsening condition of the ground water supply in the Miami area.

115. *See* WATER RESOURCES DEVELOPMENT BY THE U.S. ARMY CORPS OF ENGINEERS IN FLORIDA 13 (1959) (Okeechobee Waterway, Oklawaha River).

116. For cases granting analogous partial relief see City of Lakeland v. State *ex rel.* Harris, 143 Fla. 761, 197 So. 470 (1940); National Container Corp. v. State, 138 Fla. 32, 189 So. 4 (1939).